FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-909, 75-960, 75-1050 and 75-1055

ENVIRONMENTAL PROTECTION AGENCY, *Petitioner*,

vs.

EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA, et al., *Respondents*.

ENVIRONMENTAL PROTECTION AGENCY, *Petitioner*,

vs.

STATE OF MARYLAND, et al., *Respondents*.

COMMONWEALTH OF VIRGINIA, ex rel. STATE AIR POLLUTION CONTROL BOARD, *Petitioner*,

vs.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, et al., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth, Fourth and District of Columbia Circuits

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF STATE AND DISTRICT OF COLUMBIA PETITIONERS AND RESPONDENTS

RONALD A. ZUMBRUN,
JOHN H. FINDLEY,
Counsel, Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Attorneys for Amicus Curiae Pacific Legal Foundation.

GLENN E. DAVIS,
Pacific Legal Foundation,
1990 M Street, N.W.,
Suite 550,
Washington, D.C. 20036,
Of Counsel.

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit in *Brown v. Environmental Protection Agency* and *State of Arizona v. Environmental Protection Agency* are reported at 521 F.2d 827 and 521 F.2d 825, respectively. The opinion of the United States Court of Appeals for the Fourth Circuit in *State of Maryland v. Environmental Protection Agency* is reported at 530 F.2d 215. The opinion of the United States Court of Appeals for the District of Columbia Circuit in *District of Columbia v. Train* is reported at 521 F.2d 971.

INTEREST OF AMICUS

Pacific Legal Foundation (hereinafter PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. Twelve of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of this brief *amicus curiae*.

The Environmental Protection Agency (hereinafter EPA) published a transportation control plan for California on November 12, 1973. On December 5, 1973, PLF petitioned the United States Court of

Appeals for the Ninth Circuit to review the plan as well as EPA's enforcement regulation published November 6, 1973. Although more than 200 such petitions for review were filed by public and private entities, PLF was the only petitioner, other than the State of California petitioners, permitted to argue the merits before the court of appeals. *Brown v. Environmental Protection Agency,* 521 F.2d 827, 828 (9th Cir. 1975). That court, however, at the time it issued *Brown,* granted the State of California's motion to sever all non-state petitioners, including PLF.

Such severance notwithstanding, the court of appeals in *Brown* considered issues raised only by PLF, particularly those concerning the constitutional guarantee of a republican form of government. *Brown, supra* at 838, 840. PLF believes that, possibly because of emphasis on other points, these issues may not be fully developed by the parties.

Pursuant to Supreme Court Rule 42, this brief is filed with the written consent of all parties, which consent has been filed with the Clerk of this Court.

ARGUMENT

I

THE TRANSPORTATION CONTROL REGULATIONS VIOLATE THE POLICE POWERS RESERVED TO THE STATES BY THE TENTH AMENDMENT

The Tenth Amendment to the United States Constitution reserves to the states and to the people "[t]he powers not delegated to the United States by

the Constitution, nor prohibited by it to the States." Among the powers reserved to the states by this amendment is the "police power." Because the states existed before the United States Constitution, they possessed the police power long before the adoption of that organic document. *The Mayor, etc., of the City of New York v. Miln,* 36 U.S. (11 Pet.) 102 (1837). A vital part of the police power is the power of the states and their municipalities to regulate the public health and safety.

The United States Supreme Court in *Ambrosini v. United States,* 187 U.S. 1, 6 (1902), in dealing with an Illinois dramshop act noted:

> "The legislation was enacted in the exercise of the police power for the safety, welfare, and health of the community, and it is conceded that that power is a power reserved by the states, free from Federal restriction in any particular material here."

Indeed, the Court there noted:

> "[A]ny government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter." *Id.* at 7 (citations omitted).

EPA bases its authority to issue these regulations on the power of Congress to regulate interstate commerce. (EPA Br. at 42.) From this, EPA reasons that it may regulate the states in their capacity as owners and operators of polluting transportation facilities. (EPA Br. at 32.) These premises are stretched beyond the breaking point, however, by

EPA's conclusion that it is empowered to regulate not merely direct pollution caused by state facilities, but pollution allegedly resulting from the state's failure to exercise its regulatory (governmental) functions. (EPA Br. at 32-33.)

EPA has thus failed to make the vital distinction of federal regulation of state owned facilities otherwise indistinguishable from similar privately owned facilities and the constitutionally protected governmental functions of the state. In *National League of Cities v. Usery,* 44 U.S.L.W. 4974 (1976), this Court emphasized the distinction in citing *New York v. United States,* 326 U.S. 572, 587-588 (1946):

> "'A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general nondiscriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed.'" *National League of Cities, supra* at 4976-4977.

This Court then amplified this authority:

> "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citizens, but to the States as States. We have repeatedly recognized that

there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. . . ." *Id.* at 4977.

The lesson of *National League of Cities* is that the federal government is precluded from infringing on state "functions essential to separate and independent existence," *id.*, not because the Commerce Power does not reach so far, but because the Reserved Powers Clause prohibits it.

Federal regulations which require state officers to propose statutes dictated by a federal agency to a state legislature and, similarly, to adopt federally dictated regulations and budgets must signal the nadir of federal and state comity. Particularly since the "stick" used to impel this end is the incredible language of 40 C.F.R. § 52.23 which threatens state officers with imprisonment and heavy fines for any deviation from the federal dictates.

Standard federal policy has been to require states to pass laws as a prerequisite to the receipt of federal funds. This "power of the purse" has been approved by the United States Supreme Court on several occasions. *See, e.g., Oklahoma v. U.S. Civil Service Commission,* 330 U.S. 127 (1946). Recently, Chief Justice Burger, discussing the applicability to the states of Title IV of the Social Security Act, defined the limits of that power in a concurring opinion:

"[I]t seems appropriate to keep clearly in mind that Title IV of the Social Security Act governs the dispensation of federal funds and that it does no more than that. True, Congress has used the 'power of the purse' to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV is in no way mandatory upon the States under the Supremacy Clause." *Townsend v. Swank,* 404 U.S. 282, 292 (1971).

In *King v. Smith,* 392 U.S. 309 (1968), Chief Justice Warren also discussed the Aid to Families with Dependent Children provisions of the Social Security Act:

"The AFDC program is based on a scheme of cooperative federalism. . . . It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education and Welfare (HEW) . . . ." 392 U.S. 309, 316-317.

See also Rosado v. Wyman, 397 U.S. 397 (1970).

The portions of the Social Security Act upheld in these cases present incentives to the states which the latter may accept or reject. There is no attempt to impose the federal will on an unwilling state.

The Federal-Aid Highway Act of 1956, 23 U.S.C. §§101, *et seq.*, operates similarly. The states may vol-

untarily accept federal funds for highway construction, but are not required to accept them or to adhere to federal highway standards unless the funds are accepted. These federal laws are valid because of their scrupulous regard for the powers of the states over activities traditionally within the realm of state control.

A state may enact legislation in voluntary response to the federal "power of the purse." But it need not submit to the usurpation of its sovereign powers simply because one federal agency claims to be exercising unlimited regulatory powers granted it by Congress. EPA has overstepped the bounds of state/federal sovereignty, and its regulations must be overturned as violative of the Tenth Amendment.

II

THE REGULATIONS ABRIDGE THE RIGHT OF THE STATES TO THE CONSTITUTIONALLY-GUARANTEED REPUBLICAN FORM OF GOVERNMENT

Article IV, section 4, of the United States Constitution states, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." The regulations attempt to manipulate state government in such a way as to destroy the functions of that government and render it either a creature of the federal government or a nullity. The regulations purport to force the State of California and its officers to (1) exercise the state's legislative, executive, and judicial power and (2) in some in-

stances refrain from the exercise of such powers. Title 42, United States Code, Section 1857c-5(c), confers upon the Administrator the power to promulgate a state implementation plan; but the Administrator has no power under the Clean Air Act to usurp basic state sovereign power in doing so.

The leading case on point, *Duncan v. McCall,* 139 U.S. 449 (1891), states:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people *to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies . . . .*" *Id.* at 461 (emphasis added).

The recent case of *Sugarman v. Dougall,* 413 U.S. 634 (1973), noted:

> " 'Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' Boyd v Thayer, 143 US 135, 161, 36 L Ed 103, 12 S Ct 375 (1892); See Luther v Borden, 7 How 1, 41, 12 L Ed 581 (1849); Pope v Williams, 193 US 621, 632-633, 48 L Ed 817, 24 S Ct 573 (1904). Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' Dunn v. Blumstein, 405 US, at 344, 31 L Ed 2d 274. And this power and responsibility of the State applies . . . to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in

> the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. . . ." *Id.* at 647.

The regulatory amendment of state and local statutes and ordinances usurps the constitutional right of Californians to "preserve the basic conception of a political community" and the right to have laws of local effect enacted by representatives selected by and responsible to the local political community.

Some of the regulations issued November 6 and 12, 1973 (including excerpts or summaries of their objectionable parts), which fail under this rationale, are as follows:[1]

I. Section 52.242 which forces the state to establish a program of light-duty vehicle inspection and maintenance. It states in part:

> "(f) The State of California shall submit no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including the text of needed statutory proposals and needed regulations that it will propose for adoption. The compliance schedule shall also include:
>
> "(1) The date by which the State will recommend any needed legislation to the State legislature.
>
> "(2) The date by which necessary equipment will be ordered.

[1]All regulations are cited to Title 40, Code of Federal Regulations.

> "(3) A *signed statement* from the Governor and State Treasurer *identifying the sources and amount of funds for the program. If funds cannot legally be obligated under existing statutory authority, the text of needed legislation shall be submitted.*" (Emphasis added.);

II. Sections 52.243(c) and (f) by which the state must prohibit the use of motorcycles at certain times and during certain months, and must submit to the EPA the text of needed state statutory proposals and regulations needed to implement the motorcycle ban;

III. Section 52.244 by which the state must establish an oxidizing catalyst retrofit program and must submit the text of implementing statutes and regulations that it will propose for adoption;

IV. Section 52.245(a) which provides that "[t]he State of California retrofit program, authorized under § 39176 of the State of California Health and Safety Code . . . shall be extended to the San Joaquin Valley and Sacramento Valley Intrastate Air Quality Control Regions.";

V. Section 52.257 in which the state is forced to establish a computer-aided carpool matching system;

VI. Section 52.258 which forces the City of San Diego to ban automobiles and allow only buses on certain of its streets;

VII. Section 52.259 which forces the state to grant preferential treatment to buses and carpools on named segments of state and interstate highways;

VIII. Section 52.260 which purports to amend, by fiat of the EPA Administrator, a San Diego County air pollution control district regulation;

IX. Sections 52.261 and 52.263 which force the state to establish preferential bus and carpool lanes in the San Francisco Bay Area and Los Angeles regions; and

X. Section 52.23 which threatens state officials with imprisonment and heavy fines for failure to comply in the slightest detail with the federally-imposed controls. If any constitutionally-elected representative of the people of California "fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required to contain, or if the person or Governmental entity fails to comply with such schedule" by neglecting to propose the EPA dictated statutes and budgets or adopt EPA dictated regulations for the programs demanded by EPA bureaucrats, the draconian penalties are applied. The regulation provides for enforcement action under Section 113 of the Clean Air Act (42 U.S.C. § 1857c-8) which specifies penalties of a fine of $25,000 per

day of violation, or by imprisonment for not more than one year, or by both. These penalties are doubled for subsequent offenses.

Such removal of the legislative and executive powers from the popularly elected government of the States constitutes an abridgement of the right of the people of those States to a republican form of government. Surely, this constitutional guarantee has not been eroded to the point where State officers have become mere rubber stamps and errand boys for omnipotent federal administrative agencies.

Perhaps the most telling argument against this attempt at government by puppetry is the principle of government taking political responsibility for its own actions. Here EPA is attempting to force the States to take steps which may well prove to be politically unpopular. The political repercussions will, however, fall upon the States as the publicly visible enforcing agency and not upon EPA. In a portion of the California Transportation Control Plan not covered by the court of appeals' decision in *Brown* (because it did not require state action or enforcement), EPA proposed to limit the gasoline available to California motorists to the amount needed to attain the air quality standards. 40 C.F.R. § 52.241. In practice, this amounted to a 100 percent reduction throughout almost all of California. *City of Santa Rosa v. United States E. P. Agency,* 534 F.2d 150, 152 (9th Cir. 1976), petition for *certiorari* pending *sub nom. Pacific Legal Foundation v. Environmental Protection Agency,* No. 75-1875. Rather than face the

political consequences of an almost complete prohibition of gasoline in the nation's largest State, EPA revoked the gasoline limitation regulation. 41 Fed. Reg. 45565 (October 15, 1976). That this revocation was a political decision is made clear by the acting Administrator's statement that while the revocation renders the States' Implementation Plans "defective as a legal matter" the benefits of "retaining the gasoline rationing regulations are outweighed by the seriously disruptive social and economic consequences of such regulations." *Id.*

Because this regulation was promulgated by EPA to be enforced by EPA, EPA was able to utilize political considerations in revoking it. The remainder of the State Implementation Plans is designed to require state enforcement. But no matter how politically unpopular these programs may prove, the States are not granted the luxury of revocation exercised by EPA in the instance of gasoline rationing.

The principle of political responsibility for one's acts is basic to our republican form of government. Federal agencies must not be permitted to manipulate unwilling State officers as a political shield against public reaction to controversial programs.

CONCLUSION

For the reasons stated above, Pacific Legal Foundation urges that the decisions of the Courts of Appeals for the Ninth, Fourth and District of Columbia circuits, insofar as they preclude EPA from interference in state governmental functions, be affirmed.

Respectfully submitted,

RONALD A. ZUMBRUN,
JOHN H. FINDLEY,
Counsel, Pacific Legal Foundation,
Attorneys for Amicus Curiae
Pacific Legal Foundation.

GLENN E. DAVIS,
Of Counsel.

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